IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14786 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SOPARIWALA EXPORTS

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 14786 of 2004
MR MK VAKHARIA for Petitioner No. 1
..... for Respondent No. 1-4

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 04/11/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. The petitioner - Sopariwala Exports, a partnership firm has filed this petition through its partner and Power of Attorney Holder Mr.Yunus Abdul Gaffar Fazlani under Article 226 of the Constitution of India and prayed that a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction be issued declaring Entry `Tobacco' in the Schedule to the Gujarat Agricultural Produce Markets Act, 1963 (for short "Act of 1963") as unconstitutional and the respondents, their agents and servants be restrained from taking any action against the petitioner, its agents, servants and officers for not obtaining licence as required under Section 8 of the Act of 1963, or for not making payment of market fees or for not complying with any other regulations in the said Act.

#. It is the case of the petitioner that the Government of Gujarat, in exercise of its powers under the Act of 1963, had established 10 exclusive market yards for regulation of sale and purchase of tobacco. Thereafter, by notification published on 28.03.1997, the State Government had abolished this market area by placing "tobacco" as regulated item within the competence and jurisdiction of 30 Market Committees mentioned in the said notification (Annexure `A'). Thereupon, market committees named in the said notification were insisting for licence and payment of market fees under the provisions of the said Act but the petitioner was resisting the directions of the market committees, as, it was carrying business of exporting `tobacco', without licence from the market committees and without payment of market fees.

The notification dated 28.03.1997 (Annexure `A') was challenged by the petitioner along with others before this Court by way of Special Civil Application No. 5418 of 1998 which has been admitted by this Court and pending for final disposal. During the pendency of that writ petition, the parliament enacted "The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003" (for short Act of 2003) coming into force with effect from 01.05.2004. According to the petitioner, with the Act of 2003 coming into force with effect from 01.05.2004, the petitioner is not required to pay any licence fees to the market committees, due to the repugnancy between the Act of 2003 and the Act of 1963 and the provisions of the Act of 1963 including `tobacco' in the definition of `Narcotics' in the Schedule is ultra

vires and unconstitutional.

#. Whether there is a repugnancy between the new Central Act of 2003 and the State Act of 1963 or not ? For deciding this question, relevant provisions with the object of the State Act are required to be considered by us. From the object and reasons of Gujarat Act 17 of 1985, it clearly appears that in order to ensure proper planning and development of agricultural produce markets all over the State in a balanced manner as also to provide among other things, technical, financial and legal assistance through market committees, it was proposed to establish a statutory body under the Act of 1963. The Central Government which extends financial assistance under the central scheme for development of regulated market yards and sub-market yards had also made a suggestion for establishment of such statutory body in the State. Thus the sole purpose or object of the Act is to ensure proper planning and development of agricultural produce markets all over the State in a balanced manner. Coming to the provisions of the State Act of 1963, "agricultural produce" is defined under Section 2(i) of the said Act which is as under :

> "2(i) "agricultural produce" means all produce, whether processed or not, of agriculture, horticulture and animal husbandry, specified in the Schedule."

`Tobacco' is included under head (v) "Narcotics" of the `Schedule' to Section 2(i) of the said Act.

#. Learned senior advocate Shri K.G.Vakharia for the petitioner submitted that with the new Central Act of 2003 coming into force with effect from 01.05.2004, entry of `tobacco' in the Schedule to the said Act of 1963 under the head of "Narcotics" has to be declared as unconstitutional as there is repugnancy between the Central Act of 2003 and the State Act of 1963. In support of his submissions, Mr.Vakharia has relied on the unreported judgment of the Hon'ble Supreme Court in the case of Godawat Pan Masala Products I.P.Ltd. and another V/s Union of India and others. It was contended by Mr.Vakharia that cigarettes and other tobacco products referable to entry 52 of list 1 and entry 18 of list 2 to the 7th Schedule of the Constitution of India now holds the field in relation to tobacco. Therefore, the entry of `tobacco' in the Schedule to the State Act of 1963 must be held to be unconstitutional and it may be declared ultra vires with the new comprehensive Act of 2003 coming into force.

Mr.Vakharia had taken us through the preamble of the new Central Act of 2003 as well as definitions under Section 3(c) `distribution', 3(d) `export', 3(f) `import', 3(a) `production', 3(m) `sale', 3(n) `smoking' and submitted that though the parliament, after due consideration, found it expedient to enact comprehensive law of tobacco in the public interest and to protect public health, it has nowhere introduced provisions of taking licence or doing business as provided under the said Act of 1963. Therefore, the entry of `tobacco' in the Schedule to the Act of 1963 under the head of `Narcotics' must be struck down.

#. Preamble of the Central Act of 2003 makes interesting reading, which we would like to reproduce which is as under :

"An Act to prohibit the advertisement of and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto;

Whereas, the Resolution passed by the 39th World Health Assembly (WHO), in its Fourteenth Plenary meeting held on the 15th May, 1986 urged the member States of WHO which have not yet done so to implement the measures to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco;

And whereas, the 43rd World Health Assembly in its Fourteenth Plenary meeting held on the 17th May, 1990, reiterated the concerns expressed in the Resolution passed in the 39th World Health Assembly and urged Member-States to consider in their tobacco control strategies, plans for legislation and other effective measures for protecting their citizens with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco ;

And whereas, it is considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health ;

And whereas, it is expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by Article 47 of the Constitution;

And whereas, it is expedient to prohibit the advertisement of, and to provide for regulation of trade and commerce, production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto."

#. In light of the above, now we will consider the unreported judgment of the Hon'ble Supreme Court in Godawat Pan Masala's case (supra). From the bare reading of the said judgment, we find that facts of that case were totally different. In that case, petitioners before the Apex Court were manufacturers of different States like State of Maharashtra, State of Andhra Pradesh, State of Tamil Nadu and State of Goa. They had challenged respective notifications issued by the State Governments placing ban on the manufacturing, sale, storage, distribution of `pan masala' and `gutkha' containing tobacco in the interest of public health. The challenge to those four notifications was on the following grounds:

"(i) The Act vests the power to declare a substance as injurious to health only with the Central Government under Section 23 of the Act and no such power is vested with the State Government.

(ii) Each of the manufacturers has been issued a licence to manufacture the banned product by the Central Government under the provisions of the Act. As long as the conditions stipulated in the licence are fulfilled, and there is no violation of the terms of the licence or the provisions of the concerned, statute, it is not open to the State Government, by any administrative order, to prohibit the manufacture of the concerned, product undertaken under a licence issued by the Central Government.

(iii) The power of the State Government to frame rules under Section 24 of the Act is extremely narrow and limited to the field which is not covered by Section 23, the exclusive domain of the Central Government.

(iv) The Act is concerned with the prevention of adulterated articles of food and not intended to prohibit any article used as food or otherwise.

(v) The impugned notification dated 23rd July, 2002, issued by the State of Maharashtra operates extra territorially, and, to that extent, is ultra vires of the powers of the State.

(vi) By enacting the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, (Act 34 of 2003), Parliament has evinced its intent to occupy the whole field with regard to prohibition of advertisement and regulation of trade and commerce, production, supply and distribution of tobacco products. While the central legislation prohibits the sale of tobacco products only to persons below age of 18 years, the impugned notification purports to impose a wholesale ban without any qualification. Thus, there is a conflict between the powers exercisable under two central statutes dealing with the same subject and, therefore, provisions of the Act 34 of 2003 must prevail."

Under the Central Act of 2003, there was a prohibition on the sale of tobacco products to the persons below age of 18 years, whereas under the impugned notifications, a complete ban was imposed, therefore, the Hon'ble Supreme Court dealing with the above submission (vi) held that :

76.(6) The provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 are directly in conflict with the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954. The former Act is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a general

> enactment. Thus, the Act 34 of 2003 being a Special Act, and of later origin, overrides the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954 with regard to the power to prohibit the sale or manufacture of tobacco products while are listed in the Schedule to the Act 34 of 2003."

Under the State Act of 1963 one has to first obtain licence under the Act and to pay the fees levied on `tobacco', so that there is proper planning and development of agricultural produce markets in a balanced manner in all over the State. We failed to appreciate that how the aforesaid judgment of the Hon'ble Supreme Court in Godawat Pan Masala's case will have any application to the facts of the present case. In our considered opinion there is no repugnancy between the Act of 2003 and the Act of 1963. Therefore, there is no question of declaring entry of `Tobacco' in the schedule under the head of `Narcotics" in the Act of 1963 as unconstitutional as prayed for in the petition.

#. In view of the above discussion, this petition is dismissed summarily.

(B.J.SHETHNA, J)

(SHARAD D DAVE, J)

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